

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TRACEY SUE CABLE
Claimant

VS.

TRANSAM TRUCKING, INC.
Self-Insured Respondent

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Docket No. 1,030,908

ORDER

Claimant requested review of the August 7, 2007 Award by Administrative Law Judge (ALJ) Robert Foerschler. The Board heard oral argument on November 28, 2007.

APPEARANCES

James R. Shetlar, of Overland Park, Kansas, appeared for the claimant. Fred Bellemere III, of Kansas City, Missouri, appeared for self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ awarded claimant a 12 percent permanent partial impairment to the left shoulder as a result of her work-related injury. The ALJ reasoned that "[t]he treating physician, [Dr. Samuelson] assuming he has the applicable specialty qualifications and experience, is normally much better qualified to determine his patient's condition and its consequences. This appears true in this claim. . ."¹

The claimant requests review of this decision alleging the ALJ erred in adopting the opinions and impairment assessment offered by the treating physician over those offered

¹ ALJ Award (Aug. 7, 2007) at 6.

by Dr. James Stuckmeyer. Claimant argues that Dr. Samuelson's impairment assessment was based upon the 5th edition of the *Guides*² rather than the 4th, as required by K.S.A. 44-510e(a). And for that reason, his opinion should have been disregarded by the ALJ. Accordingly, claimant requests the Board modify the Award and grant claimant a 30 percent permanent partial impairment to the left shoulder as assessed by Dr. Stuckmeyer.

Respondent argues that taken as a whole, Dr. Samuelson's rating was sufficient under K.S.A. 44-510e(a) and therefore, the ALJ's Award should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

There is no dispute as to the compensability of claimant's claim. The sole issue to be determined in this appeal is the nature and extent of claimant's permanent impairment and the parties have agreed that claimant's impairment is limited to her left shoulder.

Two physicians spoke to claimant's diagnosis, care and treatment and ultimate impairment. Dr. Thomas S. Samuelson, her treating physician, diagnosed a full rotator cuff tear which he surgically repaired. This surgery required Dr. Samuelson to make two incisions, several inches long, into claimant's left shoulder leaving her with two scars which claimant cares not to expose. Dr. Samuelson also shaved off a portion of the distal clavical in order to eliminate any impingement. After a period of physical therapy, claimant was released from treatment although he recommended she continue her exercises at home.

Using his experience and the information gleaned in his examinations of the claimant, Dr. Samuelson ultimately rated claimant's impairment at 12 percent³ under the 5th edition of the *Guides*. When asked if the rating would be the same or different under the 4th edition of the *Guides*, he replied they are "very similar."⁴ But Dr. Samuelson offered no other evidence or testimony to establish that the different editions of the *Guides* would generate the same impairment rating.

At her lawyer's request, claimant was examined by Dr. James Stuckmeyer. Dr. Stuckmeyer conducted a single examination of claimant and rendered a 30 percent permanent partial impairment with an additional 5 percent for scarring. According to Dr. Stuckmeyer, claimant lacked a significant degree of range of motion, some weakness,

² American Medical Association Guides to the Evaluation of Permanent Impairment.

³ All ratings are to the left shoulder.

⁴ Samuelson Depo. at 13.

crepitus and positive trigger points. And based upon those conditions and his observations, her limitations qualified her for a 30 percent impairment. Dr. Stuckmeyer's testimony includes a lengthy explanation of how he came to this rating, including references to pages and tables included within the 4th edition of the *Guides*.

The ALJ was obviously persuaded by Dr. Samuelson's opinions over those offered by Dr. Stuckmeyer. The Board has considered both opinions as well as all the evidence contained within the record and concludes the Award should be modified.

K.S.A. 44-510e(a) provides in pertinent part:

... Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Dr. Samuelson's opinion as to claimant's permanent impairment is premised on the principles embodied in the 5th edition of the *Guides*, rather than the 4th, as called for by the statute. When asked if his rating would be the same or different under the 4th edition, he merely replied that the books are "very similar". Unfortunately this response does not adequately address the question. The record is silent as to Dr. Samuelson's impairment rating under the 4th edition of the *Guides*. For this reason, the statute prohibits the Court's reliance upon Dr. Samuelson's impairment opinion.

For the first time at oral argument, respondent argued that because the "rotator cuff" is not contained within the index of the 4th edition, that Dr. Samuelson was permitted, under the terms of K.S.A. 44-510e(a) to use the 5th edition to rate the claimant's impairment. The difficulty with this argument is that Dr. Stuckmeyer was able to utilize the 4th edition of the *Guides*, rating claimant's torn and surgically repaired rotator cuff. And there is no testimony from either Dr. Stuckmeyer or Dr. Samuelson that supports respondent's counsel's argument. Respondent merely asserted this fact based on his perusal of the *Guides*.

Having concluded that Dr. Samuelson's opinions cannot be considered, the only remaining opinion available is that expressed by Dr. Stuckmeyer, that being 30 percent permanent partial impairment to the shoulder. The Board finds the Award should be modified to reflect a 30 percent to the shoulder.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert Foerschler dated August 7, 2007, is modified as follows:

The claimant is entitled to 15.00 weeks of temporary total disability compensation at the rate of \$402.02 per week in the amount of \$6,030.30 followed by 63.00 weeks of permanent partial disability compensation, at the rate of \$402.02 per week, in the amount of \$25,327.26 for a 30 percent loss of use of the shoulder, making a total award of \$31,357.56.

IT IS SO ORDERED.

Dated this _____ day of December, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James R. Shetlar, Attorney for Claimant
Fred Bellemere III, Attorney for Self-Insured Respondent
Robert Foerschler, Administrative Law Judge